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CASE NO. 91-7390

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HENRY JOSE ESPINOSA

Petitioner,

vs

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The questions presented as set forth in the petition (at i) are:

I.

WHETHER HENRY ESPINOSA WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHERE THE RECORD SHOWS THAT HIS REPEATED MOTIONS FOR SEVERANCE WERE DENIED, AND AT A JOINT TRIAL WITH CO-DEFENDANT BELTRAN, BELTRAN'S COUNSEL WAS SO ANTAGONISTIC, THAT HE RELIEVED THE STATE OF MUCH OF ITS BURDEN TO PROVE THE CASE BEYOND A REASONABLE DOUBT, BY GOING BEYOND EXCULPATING HIS OWN CLIENT BELTRAN, AND VICIOUSLY BLAMING ESPINOSA FOR THE CRIME, TO THE EXTENT THAT HE ACTIVELY AND EFFECTIVELY PROSECUTED ESPINOSA EVERY BIT AS VIGOROUSLY AS THE PROSECUTOR?

II.

WHETHER THE TRIAL COURT FAILED TO PROPERLY LIMIT THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS AND CRUEL IN VIOLATION OF, AND IN CONFLICT WITH PROFITT V. FLORIDA AND MAYNARD V. CARTWRIGHT?

III.

WHETHER THE SUPREME COURT OF FLORIDA IMPROPERLY AFFIRMED ESPINOSA'S DEATH SENTENCE WHERE THE RECORD SHOWED THAT HE WAS DEPRIVED OF SUFFICIENT TIME AND FUNDS TO ADEQUATELY AND EFFECTIVELY DEFEND HIMSELF AGAINST A DEATH SENTENCE, IN VIOLATION OF ALL GUARANTEES OF FAIRNESS, JUSTICE AND DUE PROCESS; AND THAT THE IMPOSITION OF THE DEATH SENTENCE DEPRIVED ESPINOSA OF DUE PROCESS AND EQUAL PROTECTION WHILE IMPOSING A DISPROPORTIONAL CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 589 So.2d 887 (Fla. 1991) (Pet. App. A).

The opinion of the Supreme Court of Florida in the co-defendant's case is reported at 583 So.2d 1030 (Fla. 1991). (Pet. App. B).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent, State of Florida (the "State") notes that the Petitioner's statement of constitutional and statutory provisions lists applicable constitutional provision, to wit: the Fifth, Sixth, Eighth and Fourteenth Amendments

STATEMENT OF THE CASE

Petitioner, **Henry Jose Espinosa** ("Espinosa") was found guilty of first degree murder, second degree murder, attempted first degree murder, grand theft and burglary. Espinosa v. State, 583 So.2d 887 (Fla. 1991). Following the penalty phase of the trial, the jury recommended the imposition of the death penalty for the first degree murder. The trial court, followed the recommendation, and imposed the death penalty. Id.

On direct appeal to the Supreme Court of Florida, that Court affirmed the convictions and the imposition of the death penalty. Id. at 894. The Supreme Court of Florida summarizes the basic facts of the case:

Espinosa was tried together with his codefendant, Mauricio Beltran-Lopez. The state introduced evidence showing that the murders were committed in the following manner. At one time Espinosa had been neighbors with Bernardo and Teresa Rodriguez and their daughters, Odenia and Odanis. On the night of the murders, Espinosa and Beltran-Lopez went to the Rodriguezes' home. A violent struggle ensued in the kitchen during which the defendants shot and stabbed Bernardo Rodriguez to death. The defendants then grabbed Teresa Rodriguez and dragged her to the master bedroom where apparently Beltran-Lopez suffocated her with a pillow while Espinosa repeatedly stabbed her. The defendants then went to Odanis's room which was locked. Espinosa lured her out by telling her that her mother wanted her. When Odanis opened the door, Beltran-Lopez grabbed her while Espinosa repeatedly stabbed her. The defendants then left, taking some money with them. Odanis's sister, Odenia, telephoned a family friend who came and took the sisters to the hospital.

At the trial Odanis, who was eleven years old at the time of the murders, testified that during the early morning hours of July 10, 1986, she was in her room and heard her mother's and Espinosa's voices. Odanis recognized Espinosa's voice since he had been her neighbor. The telephone in her room rang and a man, who she later identified as Beltran-Lopez, came into her room, pulled the telephone cord from the wall, and left. Odanis then opened her door and saw Espinosa holding a knife while Beltran-Lopez held her mother. Her mother signalled her, so she went back into her room and locked the door. She then heard her mother say, "Don't, Henry, don't." Espinosa then came to her door and told her that her mother wanted her. When she opened the door, Beltran-Lopez grabbed her and Espinosa started stabbing her. Later, at the hospital, Odanis

identified Espinosa and Beltran-Lopez as the assailants from photographic lineups.

Odenia, who was twelve years old at the time of the murders, testified that she had heard her mother tell Espinosa that if he would leave she would not call the police. She also heard Espinosa call Odanis out of her room. She, too, had recognized Espinosa's voice because he had been their neighbor, and she had picked his picture out of a photographic lineup.

The medical examiner testified that Bernardo had been shot once and stabbed six times. Teresa had been smothered with a pillow, stabbed six times, and strangled while she was alive. The parties stipulated that Odanis was stabbed sixteen times. A fingerprint expert testified that a bloody palm print from the refrigerator was Beltran-Lopez's and a bloody fingerprint was Espinosa's. Beltran-Lopez's bloody prints were also found on a chair cover. A serologist testified that blood consistent with Beltran-Lopez's blood, from a wound to his hand, was found in several areas of the house. The serologist also testified that blood consistent with Teresa and Odanis's blood was found spattered on a pair of shorts in Espinosa's car. A Ms. Lanza, with whom Beltran-Lopez had been staying, testified that Beltran-Lopez and Espinosa brought a pack of money to her house after the murders and asked her to keep it for them, telling her it was a loan. Specks of blood were found on the money.

Espinosa, himself, testified at the trial that Bernardo had hired him to drive trucks. On the night of the murders, Espinosa and Beltran-Lopez went to the Rodriguezes' house to pick up the trucks. Bernardo then asked them to haul marijuana, but Espinosa refused. Bernardo then threatened Espinosa, and Teresa came out into the kitchen and pointed a gun at Espinosa. Beltran-Lopez

then grabbed the gun and Bernardo grabbed a knife. Beltran-Lopez then shot Bernardo and the two of them began struggling violently. Beltran-Lopez kicked and stabbed Bernardo to death. Espinosa testified that Betran-Lopez next killed Teresa and then attempted to kill Odanis. Espinosa further claimed to have taken almost no active part of the killing with the exception of stabbing Odanis once with the intention of making Beltran-Lopez think Odanis was dead so that he would leave her alone.

Espinosa also presented evidence at the trial that Bernardo Rodriguez was involved in drug trafficking. A police officer testified that a car parked in the Rodriguezes' driveway was registered to a Maria Castellanos. When the police went to her house in the course of the murder investigation, they seized over a thousand pounds of marijuana and some marijuana-trafficking equipment. They also found a dump truck at Castellanos's house similar to one parked at the Rodriguezes' house. Further, a beeper found on a man who attempted to flee Castellanos's house bore the same telephone number as a beeper found in the Rodriguezes' kitchen. A fingerprint expert testified that Bernardo Rodriguez's fingerprints were found on a cigarette pack in the car and on a candleholder in Castellanos's house.

Beltran-Lopez did not testify during the guilt phase of the trial. The jury ultimately found both defendants guilty.

During the penalty phase of the trial, Espinosa presented several character witnesses who testified that he was a good person. Espinosa also made a statement on his own behalf. Beltran-Lopez also testified, stating that after he was arrested he had given a statement to the police concerning his involvement in the murders. He largely blamed the murders on Espinosa, admitting to only minimal participation. He did admit that

> he had stolen money from the house. Beltran-Lopez's mother testified that he was a good son.

Id. at 889-891.

The jury recommended by an eleven to one vote that Espinosa be sentenced to death. The judge then sentenced Espinosa to death, finding in aggravation that (1) he previously had been convicted of a violent felony; (2) the murder was committed to prevent lawful arrest; (3) the murder was committed during an armed burglary; and (4) the murder was especially heinous, atrocious or cruel. The judge found statutory mitigation of no significant criminal history and nonstatutory mitigation that Espinosa was a good man. Id. at 891.

The jury recommended the death penalty for the codefendant by an eight to four vote. The judge then sentenced the codefendant to death, finding in aggravation that (1) he previously had been convicted of a violent felony; (2) the murder was committed to prevent lawful arrest; (3) the murder was committed during an armed burglary; and (4) the murder was especially heinous, atrocious or cruel. The judge found statutory mitigation of no significant criminal history and nonstatutory mitigation that he was a good son. 583 So.2d at 1031.

In the direct appeal, the Supreme Court of Florida affirmed the conviction and sentence of death. 589 So.2d at 894. The Court rejected Espinosa's claim that he was entitled to have his trial severed from the codefendant. The Court noted McCray v. State, 416 So.2d 804 (Fla. 1982) states that severance is not required simply because codefendants blame each other for the crime. The key is that each defendant has the opportunity to cross-examine the other if the other chooses to testify. Id. at 891-892. The Court held:

> Under this standard, Espinosa and Beltran-Lopez were clearly not entitled to separate trials. The fact that Espinosa testified at trial and was subject to examination by Beltran-Lopez's attorney is not a sufficient reason to grant severance. Further, Espinosa was not prejudiced by an inability to cross-examine Beltran-Lopez during the guilt phase since Beltran-Lopez did not testify and the state did not attempt to introduce Beltran-Lopez's confession. Beltran-Lopez did testify during the penalty phase, but Espinosa was able to cross-examine him. No evidence was introduced in this trial that could not have been introduced against either Espinosa or Beltran-Lopez if either had been tried alone. Therefore, we find that Espinosa and Beltran-Lopez were not entitled to a severance.

Id. at 892.

The Florida Supreme Court also rejected Espinosa's contention that the aggravating circumstances of heinous,

atrocious or cruel was unconstitutionally vague under Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1053, 100 L.Ed.2d 372 (1988). Id at 894.

REASON FOR DENYING THE WRIT

I.

THE DENIAL OF SEVERANCE DID NOT RESULT IN AN UNFAIR TRIAL WHERE THE EVIDENCE WAS NOT CONFUSING OR PREJUDICIAL.

Espinosa contends that his trial was fundamentally unfair because it was not severed from his codefendant. The trial was unfair, it is contended, because the defenses were irreconcilable and antagonistic and because the joint trial precluded Espinosa from presenting his entire defense.

The contention of irreconcilable and antagonistic defenses lacks support from the record. Espinosa's defense at trial, was that the victim had hired him to drive trucks. On the night of the incident Espinosa and his codefendant went to the victim's house to pick up the trucks. At that pcint the victim asked him to haul marijuana. When Espinosa refused, the victims tried to force Espinosa by threatening him with a gun. At that point the codefendant grabbed for the gun, and killed one of the victims. Espinosa then testified that his codefendant killed the other victim as well as perpetrated the attempted murder. He claimed that he did not have an active role in the killings. Espinosa buttressed the marijuana defense by claiming that the victim was involved in trafficking of marijuana.

Although, the codefendant did not testify at the guilt/innocence part of the trial, he did testify at the penalty phase. The codefendant blamed the murders on Espinosa, admitting to only minimal participation.

The historical facts as summarized by the Florida Supreme Court in its decision, reflect that the victim was stabbed and effectually suffocated by a pillow. The victim's daughter testified that she saw the codefendant hold her mother while Espinosa was stabbing her with a knife. The codefendant suffered a knife wound on his hand and his blood was found all over the house. Espinosa's fingerprint was found in blood and blood consistent with the victim's and her daughter was found on Espinosa's shorts. Espinosa and his codefendant turned over blood stained money to friends for safe keeping.

Based on the foregoing, this case was the classic one for a joint trial. Richardson v. Marsh, 481 U.S. 200, 210, 107 S.Ct. 1702, 95 L.Ed.2d 170 (1987):

> . . . Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability-advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

The Florida Supreme Court in affirming the denial of severance specifically relied on these factors. 589 So.2d at 892. Espinosa and his codefendant blamed each other for the murders. Clearly the jury was properly given the task of determining credibility and culpability. Here the jury believed only the eyewitness' and physical evidence and discredited both Defendant's version of the facts. Therefore the joint trail served its purpose to ensure that all the evidence would be considered and consistent verdicts would be entered.

Espinosa's second contention that the joint trial precluded him from presenting his entire defense is based on the fact that he was not allowed to present evidence of his codefendant's violent propensities. Specifically, he wanted to show that his codefendant had a history of violent behavior when he lived in Nicaragua. He contends that this would have supported his defense that the codefendant flew into a rage during the argument and he killed the victims.

The Florida Supreme Court was presented with the claim and rejected it on the ground the evidence was inadmissible, regardless of whether the trial was joint or separate, since all it established was that the codefendant generally had a violent disorder.

> We reject these claims. The evidence of Beltran-Lopez's violent history is clearly inadmissible under section

> 90.404, Florida Statutes (1987). If Espinosa's intention was to show that Beltran-Lopez had a generally violent character, then the evidence was inadmissible under section 90.404(1). That section states that "[e]vidence of a person's character or a trait of his character is admissible to prove that he acted in conformity with it on a particular occasion." This general rule has several exceptions, none of which applies to this evidence. If Espinosa intended to present the evidence as similar fact evidence of other crimes, wrongs, or acts, then the evidence was inadmissible under section 90.404(2)(a) since it clearly would be offered solely to prove Beltran-Lopez's bad character or propensity.

Based on the foregoing, Espinosa received a fair trial and the denial of severance did not result in a deprivation of his constitutional rights.

II.

THE FLORIDA SUPREME COURT HAS NOT APPLIED THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS OR CRUEL IN AN OVERBROAD MANNER.

Espinosa contends that Florida's aggravating circumstance of heinous, atrocious or cruel violates this Court's decision in Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). More specifically, he contends that the jury instruction is overbroad and since no explanation of the term is given to the jury, it is violative of the Eighth Amendment.

The Florida Supreme Court has addressed the issue of the nonapplicability of Maynard to Florida's capital sentencing process in Smalley v. State, 546 So.2d 720 (Fla. 1989). The court therein held that the decision in Maynard, which related to Oklahoma's capital sentencing scheme, does not apply in Florida, because in Florida the trial court, not the jury, is the actual sentencer and because the Florida Supreme Court has adopted and consistently applied a limiting construction of the aggravating circumstance of heinous, atrocious and cruel. The Florida Supreme Court reasoned further:

> This Court has narrowly construed the phase "especially heinous, atrocious, or cruel" so that it has more precise meaning than the same phrase has in Oklahoma. In *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), we said:
>
> > It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> It was because of this narrowing construction that the Supreme Court of

> the United States upheld the aggravating circumstance of heinous, atrocious, or cruel against a specific eighth amendment vagueness challenge in *Profitt v. Florida*, 428 U.S. 24, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. E.g., *Garron v. State*, 528 So.2d 353 (Fla. 1988); *Jackson v. State*, 502 So.2d 409 (Fla. 1986), *cert. denied*, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); *Jackson v. State*, 498 So.2d 906 (Fla. 1986); *Teffeteller v. State*, 439 So.2d 840 (Fla. 1983), *cert. denied*, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). That *Proffitt* continues to be good law today is evident from *Maynard v. Cartwright*, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. *See Maynard v. Cartwright*, 108 S.Ct. at 1859.
>
> Id. at 722.

Espinosa's contention therefore must be rejected since the application heinous, atrocious or cruel is strictly limited and strictly enforced to those crimes which are conscienceless or pitiless and which are unnecessarily tortuous to the victim. Therefore it does not violate the Eighth Amendment.

III.

THE SENTENCE OF DEATH WAS IMPOSED IN ACCORDANCE WITH DUE PROCESS OF LAW.

Espinosa first claims that he was denied a continuance to prepare for the penalty phase. The Florida Supreme Court rejected this claim as follows:

> Turning to the penalty phase of the trial, Espinosa first claims that he was denied the time and money necessary to present mitigating evidence by flying in several of Espinosa's family members from Central America to testify to a history of mental and physical child abuse. Counsel claims that he did not make the motion to bring them to the United States until the beginning of the penalty phase because Espinosa had been embarrassed to tell him about the abuse until the penalty phase was imminent. Espinosa also claims that the judge should have granted him a delay to obtain new counsel for the penalty phase to his trial. Espinosa wanted to be represented by an experienced death-penalty lawyer from Texas, and he informed his counsel of his desire at the end of the guilt phase.
>
> Espinosa and his counsel were aware for several months that the state would seek the death penalty. On the first day of the trial, the trial judge informed Espinosa and his attorney that he would begin the penalty phase of the trial approximately two hours after the jury returned its verdicts. Espinosa's counsel agreed to the procedure. "The granting or denial of a motion for continuance is within the discretion of the trial court." *William v. State*, 438 So.2d 781, 785 (Fla. 1983), *cert. denied*, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 146 (1984). The trial judge did not abuse his discretion. Any prejudice to Espinosa was a result of his own delay in preparing for the penalty phase of the trial.

589 So.2d at 893.

Based on the foregoing facts, the denial of the continuance did not violate Espinosa's due process rights. This Court addressed this in Ungar v. Sarafite, 376 U.S. 575, 589 (1964):

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. (Citations omitted).

When a motion for a continuance for the purpose of securing witness is denied a key factor in the determination is whether due diligence was used to secure the witness. United States v. Upton, 531 F.2d 1281 (5th Cir. 1976).

Applying the foregoing to the instant case it to clear that Espinosa's lack of due diligence resulted in the delay in preparing for the penalty phase. As such the denial of the continuance did not deny him due process of law.

Espinosa's next contention which in any way touches upon due process, is that his death sentence was disproportionate. A defendant is afforded due process when a State court does a proportionality review. He does not have due process claim on the ground that the State court's proportionately review is not to his liking. Solomon v. Kemp, 735 F.2d 395 (11th Cir. 1984).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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